IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-1070

EUGENE L. SMALDONE, JR., Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Petitioner, Eugene L. Smaldone, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 9, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (App. A, pp. 1a-22a, infra) is reported at 544 F.2d 456. The opinion of

the United States District Court for the District of Colorado (App. B, pp. 23a-37a, infra) is not reported.

JURISDICTION

The Judgment of the Court of Appeals was entered on November 9, 1976. Time for filing a petition for a writ of certiorari expires on February 7, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the deliberate suppression by the prosecution of documentary evidence tending to show that a crucial government witness had offered his services as an informer for the specific purpose of assisting the Government to link Defendant to a crime not yet committed, violates the doctrine of Brady v. Maryland, 373 U.S. 83 (1963).

2. Whether a statement of such a witness containing such evidence is producible under the Jencks Act, 18 U.S.C. § 3500.

3. Whether a defendant may be deemed to have waived his right to receive Jencks Act material by not moving for its

production prior to trial, when no statute or rule of Court requires a pre-trial motion, and the Jencks Act entitles the Defendant to the material only after a Government witness has testified at trial.

STATUTES INVOLVED

The Jencks Act, 18 U.S.C. § 3500, provides in pertinent parts, as follows:

> "(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant), shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If

the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use."

* * *

STATEMENT

This proceeding was brought under 28 U.S.C. § 2255 to vacate Petitioner's conviction and sentence.

A. Proceedings Below

An Indictment in the United States District Court for the District of Colorado named Petitioner Eugene L. Smaldone, Jr., as a Defendant in three counts. Two counts charged Petitioner with aiding and abetting the importation of cocaine and possession of cocaine; a third charged him with conspiring to import cocaine. In a jury trial before Judge Hatfield Chilson, which commenced on November 13, 1972, Petitioner was acquitted on the substantive counts of the Indictment but convicted on the conspiracy charge.

Petitioner was sentenced to a term of imprisonment of ten years, together with a special parole term of three years. His conviction was affirmed by the Tenth Circuit on August 14, 1973, 484 F.2d 311, and his Petition for a Writ of Certiorari was denied by this Court on February 19, 1974, 415 U.S. 915. He was denied bail pending appeal and has been serving his sentence since January 5, 1973.

B. Petitioner's Trial

The thrust of the conspiracy charge against Petitioner was that in May 1972, he entered into an agreement with one Larry Merkowitz to invest in a plan to import cocaine into the United States. The prosecution contended that the plan called for Craig Mundt, Ronald Greenspan and Ronald Nocenti to travel to Peru to purchase cocaine and then smuggle it into the United States. The prosecution further contended that Petitioner gave $9,750 to Merkowitz for the purchase of the cocaine and that he

received delivery of a sample of the cocaine from Nocenti.

Nocenti was a key prosecution witness. Nocenti testified that he had offered his services as an informer to the Bureau of Narcotics and Dangerous Drugs ("BNDD") in March 1972 (Tr. 267, 307, 313-14),[1/] thereafter became a paid Government informer (Tr. 300-305), and had joined the conspiracy to import cocaine in April 1972 (Tr. 318, 329) -- all prior to Petitioner's alleged involvement (Tr. 338-39). Nocenti provided critical -- and sharply disputed -- testimony linking Petitioner with the conspiracy: he testified that he had physically delivered a sample of the alleged cocaine to Petitioner and this substance was in Petitioner's possession at the time of his arrest (Tr. 280-82).

1/ "Tr." refers to the transcript of Petitioner's trial.

"M.Tr." refers to the transcript of the later trial of Petitioner's alleged co-conspirator, Craig Mundt, portion of which were appended to Petitioner's § 2255 Motion.

Nocenti's testimony also provided the authentication for the recording of a telephone conversation with Petitioner which Nocenti initiated and which was designed to incriminate Petitioner (Tr. 271-73). This recording was introduced in evidence (Tr. 288). Nocenti's testimony was thus crucial to the prosecution's case; and the incriminating portions of this testimony were entirely uncorroborated.

The defense sought to impeach Nocenti's testimony by demonstrating that he had "set up" or "framed" Petitioner in return for informer's fees from the Government.[2/] The present proceeding under 28 U.S.C. § 2255 arises

2/ At trial Nocenti admitted his receipt of a total of $14,800 in payments from the Government as an informer (Tr. 305). He has succeeded in recovering an additional $17,400 arising from this transaction. See United States v. Seventeen Thousand Four Hundred Dollars in Currency and Nocenti, 524 F.2d 1105 (10th Cir. 1975). Nocenti had regularly earned less than $4,000 a year (Tr. 301-2).

from the Government's suppression of information and a document which would have strongly assisted the effort to impeach Nocenti.

On cross-examination, Nocenti admitted that he had spoken with agents of the BNDD in early March 1972, prior to Petitioner's alleged involvement in the conspiracy (Tr. 313-14). Nocenti was questioned as to his reading of reports of interviews he had had with Government agents. He testified that he had read over "a variety of reports from the time I started on this". The prosecutor then stated that "[t]hey have been furnished under the Jencks Act to counsel" (Tr. 291).

When asked about his initial interview with the BNDD, Nocenti stated that he had spoken at that time with an Agent Spears of the BNDD, but denied that the Smaldone name had been mentioned (Tr. 316). What Nocenti left unsaid was that his interview with Spears had been perfunctory -- only about two minutes -- and that his substantive interviews had

taken place shortly thereafter with another BNDD agent, one Donald Farabaugh (M.Tr. 238-39). The Assistant United States Attorney not only did not disclose this fact, but successfully objected to defense counsel's attempts to elicit information as to exactly what interviews had taken place -- both those before (Tr. 307) and those after the first interview with Spears (Tr. 314-15). He successfully objected to inquiries as to how long the interview with Spears had been (Tr. 314), and whether there had been any subsequent interview (Tr. 316). When defense counsel requested that the BNDD reports relating to Nocenti's initial interview be produced and inspected by the Court in camera, the request was denied because Petitioner was unable to produce "some evidence that there is such a report" (Tr. 316).

During the colloquy described above, BNDD Agent Farabaugh sat at the prosecution counsel table as an advisory witness and remained silent.

Petitioner testified on his own behalf. He stated that he had ar-

ranged a meeting with Nocenti on May 30, 1972, for the purpose of advising Nocenti that he was not involved in the plan to import cocaine and that Merkowitz had improperly, and without authorization, injected his name into discussions with Nocenti (Tr. 694-99). Petitioner further testified that, as he was leaving the meeting, Nocenti told him that he owed Tomeo some money and asked if Petitioner would deliver an envelope containing that money to Tomeo. Petitioner agreed and took an envelope from Nocenti and placed it in a trouser pocket. As he left the meeting, he was immediately arrested (Tr. 700-703). The envelope in his pocket, according to the Government, contained cocaine.

Tomeo was called as a witness by the defense. He testified that he had met with Nocenti on May 28, 1972 -- two days before Nocenti's meeting with Appellant -- to discuss the money that Nocenti owed him. Tomeo testified that Nocenti then told him that he expected to be able to repay his debt within a few days. Petitioner was precluded

from exploring this matter with Nocenti during his cross-examination (Tr. 327, 335-36).

C. The Mundt Trial

Commencing on January 28, 1974 -- more than a year after Petitioner's trial -- Craig Mundt was separately tried before Chief Judge Alfred A. Arraj, sitting with a jury, on the same conspiracy charge upon which Petitioner had been convicted.

Nocenti again was a key prosecution witness. On cross-examination, he testified that in February 1972, when he first offered his services as an informant to the BNDD (M.Tr. 238-39), he was interviewed by Farabaugh, who took notes of the conversation (M.Tr. 249).[3/] Nocenti admitted that he told the BNDD at this meeting that he knew Petitioner (M.Tr. 240).

3/ Nocenti testified that he first spoke with Agent Spears and then with an unidentified BNDD agent and with Agent Farabaugh extensively (M.Tr. 238-39).

Defense counsel for Mundt requested that the notes of the Nocenti interview be produced. After conferring with Farabaugh, the prosecutor vigorously opposed production, asserting that the notes contained only intelligence information, but "nothing related to this case" (M.Tr. 250). Upon defense counsel's renewed request, Judge Arraj ordered that the notes be turned over to him (M.Tr. 251), examined them in camera, excised certain portions which he ordered sealed, and turned the remainder over to defense counsel to examine (M.Tr. 265). These notes are hereinafter refered to as the BNDD Report.

D. The Report Of The Nocenti Interview

Petitioner discovered the existence of the BNDD Report some time following the Mundt trial and upon motion -- and over Government objection -- was granted access to it by Judge Arraj.

The Report, which sets forth the details of the initial interviews of Ronald Nocenti on March 1 and March 6, 1972, was prepared by the very same

BNDD Agent, Farabaugh, who was sitting at the prosecution counsel table at Petitioner's trial during the colloquy described at pp. 8-9, supra.[4/]

The dominant subject of the interviews was the Smaldone family, and Nocenti's relationship with this family. Five of the seven substantive paragraphs in the Report, which is reproduced as Appendix C to this Petition, relate to the Smaldones. The Report indicates when and how Nocenti first met Eugene Smaldone, describes a loan transaction which he entered into with him through Tomeo, indicates that Nocenti had known Eugene Smaldone and Tomeo since 1968 and that he did favors for them and transported them. The Report also notes that Nocenti stated that he had installed a sound system in the Smaldone home, and suggests that he was familiar with the contractor who built the home. The Report indicates further that Nocenti

4/ The Report also lists two other BNDD agents as having participated in the interviews.

made vague allusions implying a connection between the Smaldones and certain individuals involved with narcotics.

E. The District Court's Ruling Upon The § 2255 Motion

By Opinion and Order filed on October 31, 1975, Judge Chilson denied Appellant's Motion under 28 U.S.C. § 2255.

With respect to the claimed violations of Brady v. Maryland, 373 U.S. 83 (1963), and the Jencks Act, 18 U.S.C. § 3500, the District Court asserted (App. 32a, infra):

> "The Farabaugh notes have no relation to Nocenti's testimony at Mr. Smaldone's trial, nor are they exculpatory in nature nor do they impeach Nocenti's testimony given at the Smaldone trial."

The District Judge also claimed that (App. 36a, infra) the Farabaugh notes contained "nothing which could be used for impeachment purposes" and that the information was "extraneous to . . . any attempt to 'frame' Smaldone." He further held that Nocenti's testimony at trial did not constitute perjury because the question as to whether Mr. Smaldone was discussed had come up in the context

of an inquiry as to whether that had occurred on the occasion of Nocenti's conference with a particular BNDD agent, Spears.

In an opinion entered on November 9, 1976, (App. 1a, infra), the Court of Appeals affirmed. It agreed with the District Court that "the Farabaugh notes have no relation to Nocenti's testimony at Smaldone's trial, are not exculpatory in nature and do not impeach Nocenti's testimony given at Smaldone's trial" (App. 10a-11a). Reciting approvingly speculation from the Government's Brief, the Tenth Circuit opined that "The Report can fairly be characterized, as the Government contends, as Farabaugh's notes describing that related by Nocenti concerning Nocenti's 'general background and to outline his knowledge of criminal activities'" (App.13a). It rejected as failing "to recognize the basics of our adversary system" Petitioner's challenge to the propriety of the Government's silence at trial concerning the existence of the Report (App. 20a-21a). The Tenth Circuit, once again adopting essentially verbatim the Government's position, also indicated that Petitioner had waived his

right to obtain Jencks Act material by not making a pretrial motion for it (App. 21a).

REASONS FOR GRANTING THE WRIT

The Tenth Circuit has unduly restricted the scope of the prosecution's duty, under both Brady v. Maryland, 373 U.S. 83 (1963), and the Jencks Act, 18 U.S.C. § 3500, to reveal material useful to impeach a witness, and undermined the fundamental purposes of that decision and statute. It has further taken an improperly "sporting" view of the prosecutor's obligations to be forthcoming with information during the course of a trial, and thereby encouraged prosecutors to allow to stand without qualification testimony they know to be misleading to both the Court and jury. It has held, inexplicably, that a defendant waives his right to Jencks Act material by not demanding the information even before he is entitled to receive it. In each of these respects, the decision below raises important and recurrent issues concerning the suppression of evidence in criminal trials, and of the proper procedure with respect to Jencks Act and Brady material.

1. The Tenth Circuit held that the statement of a witness could not be "related to" his direct testimony for purposes of the Jencks Act, nor constitute exculpatory evidence under Brady v. Maryland, supra, if it was made before the events as to which the witness testified. That holding, in violation of many decisions of this Court and of various courts of appeals, unduly restricts the nature of evidence which is producible as "impeaching" evidence. It also flies in the teeth of the rationale of both Brady and the Jencks Act. Indeed, the material suppressed here, is of a kind heretofore routinely produced by conscientious prosecutors or regularly ordered to be produced when a prosecutor fails to meet his duty -- as is graphically demonstrated by the fact that a different district judge ordered the production of the very report at issue during the separate subsequent trial of Petitioner's alleged co-conspirator.

Despite the Tenth Circuit's convoluted effort to explain away the significance of the suppressed material, its pertinence to the defense was beyond

cavil: Petitioner sought to show that Nocenti set him up for a price (which Nocenti denied). The BNDD Report showed that months before the alleged conspiracy was supposed to have begun, Nocenti had come to the BNDD and discussed Petitioner in connection with drug-related matters, and offered his services.

It is settled beyond the faintest doubt that the Government must disclose, inter alia, that a witness is a paid informer, or otherwise is biased:

> "We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination."

Davis v. Alaska, 415 U.S. 308 at 316-17 (1974). Accordingly, if, for example, evidence was suppressed that the prosecution made promises to a witness prior to his testimony, that fact "[u]nquestionably . . . would require reversal of petitioner's conviction." DeMarco v. United States, 415 U.S. 449 (1974). Accord, Giglio v. United States, 405 U.S. 150 (1972).

There is no rational basis for distinguishing from the Government's unquestioned duty to reveal payments or promises made to a witness or the fact that he is an informer, its duty also to reveal that an informer specifically went to the Government to discuss the Defendant before the criminal activity in question took place.[5/] If anything, the latter information, which reflects not merely "interest" but bias on the part of the witness, much more clearly

5/ The Tenth Circuit asserted that (App. 6a) because Petitioner previously had been convicted of gambling offenses, there was nothing unusual in Nocenti's discussing him "in light of Smaldone's criminal record." But Petitioner had never before been accused of any crimes involving narcotics, and the indictment did not charge him with any narcotics offenses at or prior to the time of Nocenti's initial contact with the BNDD. And it was the narcotics authorities, rather than gambling authorities to whom Nocenti offered his services as an informer. The Tenth Circuit's speculation was improper both because the inference it drew is totally unsupported on the record, and because, as discussed in the text, in so speculating it was usurping the function of the jury.

affects his credibility. Yet here the Tenth Circuit sanctioned the suppression of the fact that Nocenti's initial contact with the Bureau of Narcotics and Dangerous Drugs concerned Petitioner almost exclusively.

The Tenth Circuit only magnified its error by speculating (App. 13a) that "The Report can fairly be characterized, as the Government contends, as Farabaugh's notes describing that related by Nocenti concerning Nocenti's 'general background and to outline his knowledge of criminal activities.'" If Nocenti had been subjected to cross-examination on this point and had given the lame explanation that two interviews with the BNDD were devoted almost exclusively to Petitioner and his family merely as "general background", he would have been completely discredited.[6/] In all events,

6/ The suppressed Report also demonstrated that Nocenti had discussed with Agent Farabaugh the existence of a loan from Petitioner to Nocenti. That such a discussion took place was probative of the defense theory that Petitioner thought that he was receiving money from Nocenti at the meeting just prior (cont. on next page)

"the jury was entitled to know" the whole truth, to hear any explanation Nocenti could give, and to make up its own mind on the issue of credibility thus posed, Giglio v. United States, 405 U.S. 150, 154-55 (1972). The Tenth Circuit improperly usurped the function of the jury.

Impeaching evidence of that character is both "exculpatory" within Brady (see, e.g., Giglio v. United States, supra; Williams v. Dutton, 400 F.2d 797 (5th Cir. 1968), cert. denied, 393 U.S. 1105; Ingram v. Peyton, 367 F.2d 933, 936-7 (4th Cir. 1966); cf. United States v. Polisi, 416 F.2d 573,

6/(cont. from previous page) to his arrest, and also that Nocenti had used the loan to "set up" Petitioner.

The Tenth Circuit contended that because the existence of such a loan was known to the jury, Petitioner could not have been prejudiced by non-disclosure of this aspect of the Report (App. 9a). However, what the jury should have, but did not know, was that the loan had been brought up at the outset of Nocenti's relationship with the BNDD, thus suggesting a pre-conceived intent to use it against Petitioner.

577 (2d Cir. 1969)), and "related to" the witness' testimony within the meaning of the Jencks Act (e.g., Campbell v. United States, 365 U.S. 85, 92 (1961); United States v. Birnbaum, 337 F.2d 490, 497-98 (2d Cir. 1964) ("We can see no reason why a statement that would support impeachment for bias and interest does not 'relate' to the witness' testimony as much as a statement permitting impeachment for faulty memory")).[7/]

7/ The Tenth Circuit discussed (App. 14a-16a), but did not decide whether the BNDD Report was a "statement" for purposes of the Jencks Act. It noted that its decisions conflict with rulings of other circuits on that point. This issue was not, however, properly before the Tenth Circuit. The Government failed to raise any such objection at trial of this case, or in the Mundt case, when it resisted and Judge Arraj ordered production of the document, or, finally, in the District Court in this § 2255 proceeding. In this § 2255 proceeding, the Government itself characterized the report as "the statement taken by Agent Farabaugh of Mr. Nocenti." (Government "Response" in Dist. Ct., p. 5, last paragraph).

The Government's attempt to question whether the document is covered by the Jencks Act for the first time in the Court of Appeals was untimely. An attempt to defend a District Court de-

(cont. on next page)

Although in a Brady case, the Court must weigh whether the improper suppression vitiates the fairness of a trial, see United States v. Agurs, 427 U.S. 97 (1976), that test necessarily is met if a conviction could be saved only by the Court's adoption of improbable speculations which properly require scrutiny under cross-examination and assessment by the jury. Such supplanting of the jury has been particularly rejected where the suppressed information is of the nature involved here, going directly to the bias of a crucial witness. In these circumstances, the suppression "[u]nquestionably . . . would require reversal of petitioner's conviction." DeMarco v. United States, supra.

2. Even were this a case where the existence of the information at issue was revealed and the material was re-

7/ (cont. from previous page)
cision on bases other than the one relied upon by the Court, must raise a ground "that finds support in the record", Jaffke v. Dunham, 352 U.S. 280 (1957). In all events the objection was unfounded and based upon the same kinds of documents as were rejected in Campbell v. United States, 373 U.S. 487 (1963).

quested for the first time post-trial, its suppression would have required a new trial for the reasons set forth above. But the Tenth Circuit treated the case as being of that genre only by making light of the prosecutor's professional responsibilities to ensure "that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). Its decision presents in this regard an important question of the application of United States v. Agurs, supra. As this Court noted in Agurs, with respect to Brady material, "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." 427 U.S. at 106. In the present case, the prosecution evaded that duty by blocking all efforts of the defense to determine, through questioning, exactly what interviews had taken place, and by permitting to stand without qualification misleading testimony of Nocenti which left the impression with both the Court and the jury that Petitioner had not been discussed in Nocenti's initial interview with the BNDD and that no report of that

interview existed. The prosecution's resistance occurred despite its knowledge of the existence of the report and its content,[8/] and its specific awareness that it was a central defense theory that Nocenti had in substance come to the BNDD and asked "what is it worth to you for me to set up Mr. Smaldone" (Tr. 308).[9/] Any prosecutor remotely faithful

8/ "The fact that it was the Bureau of Narcotics and Dangerous Drugs, and not the United States Attorney's Office, which had possession of the [Report]. . . does not render it any less discoverable. The duty of disclosure affects not only the prosecutor, but the Government as a whole, including its investigative agencies." United States v. Bryant, 439 F.2d 642, 650 (D.C. Cir. 1971). Accord, Smith v. Florida, 410 F.2d 1349, 1351 (5th Cir. 1969); Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964). See Comment, Brady v. Maryland and the Prosecutor's Duty to Disclose, 40 U.Chi.L.Rev. 112, 124-25 (1972).

9/ Thus, the Tenth Circuit's characterization (App.20a) of Petitioner's position as being "that the Government prosecutor has an obligation to produce evidence which may or might in any manner aid in his defense" is inaccurate. The prosecution here knew at trial what the defense theory was and why it was relevant.

to his ethical duties of candor to the Court and to "conduct criminal trials with an acute sense of fairness and justice" (United States v. Dawson, 486 F.2d 1326, 1330 (5th Cir. 1973)), would have forthrightly advised the District Court of the existence of the Farabaugh interviews and the Report at trial, and made any objections to production openly.

This Court should review, and reject in its inception, this effort to evade prosecutorial duties. If this Court's holding in Agurs that the prosecutor may seldom fail to respond to specific requests is to have meaning, it cannot be a permissible tactic for the prosecutor to make a specific request for a particular document impossible by devious and obstructionist actions. As Judge Friendly observed in United States v. Keogh, 391 F.2d 138, 148 (2d Cir. 1968), "[t]he request cases . . . stand on a special footing; the prosecution knows of the defense's interest and, if it has failed to honor this even in good faith, it has only itself to blame."

Contrary to the Tenth Circuit's apparent view, a prosecutor's duty does not end with the avoidance of outright perjury,[10/] and it is not Petitioner who has failed "to recognize the basics of our adversary system." If a prosecutor knows or "should discover some fact which would militate in the defendant's favor it would be his moral and legal duty to bring this to the jury's attention * * *." United States ex rel Almeida v. Baldi, 195 F.2d 815, 819 (3d Cir. 1952), cert. denied, 345 U.S. 904 (1953), quoting from Commonwealth v. Neill, 362 Pa. 507, 520, 67 A.2d 276, 282 (1949). And certainly he cannot block the efforts of the defense to find out whether such evidence exists.

10/ The Tenth Circuit incorrectly implied that Petitioner's position depended upon showing that Nocenti's testimony constituted "outright perjury" (App. 18a). The portion of his Brief as appellant which the Tenth Circuit quoted (pp. 26-29) made clear that he considered that, whether or not Nocenti's testimony was outright perjury, the prosecution could not "fail to reveal that his conversation with Spears had been perfunctory and the substantive interviews had actually been held with Farabaugh" (Appellant's Brief, p. 27).

As stated by Judge Lumbard in United States v. Zborowski, 271 F.2d 661, 668 (2d Cir. 1959):

> "The prosecutor must be vigilant to see to it that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried. In the long run it is more important that the government disclose the truth so that justice may be done than that some advantage might accrue to the prosecution toward ensuring a conviction. Berger v. United States, 1935, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314.
>
> "The requirement that the government must prove its case beyond a reasonable doubt means, at the very least, that the government itself should not, by any failure to disclose relevant evidence, prevent the defendant from producing evidence which might create the reasonable doubt. Our standards of fair play in federal criminal proceedings require that the government should present its evidence in its true colors and that it should never be a party to withholding any evidence which materially bears on the credibility of a witness it places on the stand."

The failure of the Tenth Circuit to recognize and enforce that standard warrants review by this Court.

3. The Tenth Circuit held (App. 20a-21a)that Petitioner did not make a "timely motion" for Jencks Act material, and suggested that he "cannot be permitted to elect to freely pursue one course at pretrial and then, when that course has proved unprofitable, to allege deprivation of a fair trial on appeal." That holding is outlandish and in conflict with decisions of numerous other circuits. Not only is there no requirement that Jencks Act material be requested prior to trial, but the purpose of the Act was to restrict pretrial discovery in criminal cases. By its terms, the operation of the Act's requirements of disclosure is triggered by testimony at trial, and it was at that time that Petitioner sought to learn what statements had been made by Nocenti and to obtain them. It has been an invariable position of the Government, supported by many appellate decisions "that the proper time for such a motion is at the time the witness testified at

trial . . . ." Hanger v. United States, 398 F.2d 91, 97 (8th Cir. 1968), cert. denied, 393 U.S. 1119 (1969); United States v. Feinberg, 502 F.2d 1180 (7th Cir. 1974), cert. denied, 420 U.S. 926 (1975); United States v. Harris, 458 F.2d 670, 675-76 (5th Cir. 1972), cert. denied, 409 U.S. 888 ("Johnson's statement falls squarely within the Jencks Act, which requires that the government produce any statement taken pursuant to the Act, but only after the government's witness has testified on direct examination.").

The Government cannot be allowed to contend at once that Jencks Act material is unavailable until a witness testifies, and yet that the right to such material is waived by not making a pretrial motion. In the present case that conduct is particularly unwarranted, for the prosecutor announced during Nocenti's testimony that he had provided the Jencks Act material (Tr. 291).[11/]

11/ No local Rule requires the filing of such a pretrial motion. The only pertinent rule, General Rule 15 in Criminal Cases, U.S. Dist. Ct. for the Dist. of Colo., requires the prosecution to turn (cont. on next page)

The issue of when Jencks Act material must be requested is manifestly one of broad and recurrent interest. The Tenth Circuit's ruling seems entirely inconsistent with the terms of the Act and all prior precedent.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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11/ (cont. from previous page) over Brady material without the filing of a motion. That rule of course is now encompassed in this Court's decision in United States v. Agurs, 427 U.S. at 107.

APPENDIX

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

(Caption Omitted in Printing)

OPINION

(filed November 9, 1976)

Eugene L. Smaldone, Jr. (Smaldone) appeals the denial of his habeas corpus motion under 28 U.S.C. §2255 to vacate and set aside his conviction and sentence. Smaldone is presently incarcerated in the federal penitentiary in Leavenworth, Kansas.

Smaldone was indicted and tried in the United States District Court for the District of Colorado in 1972. The jury found him guilty of a conspiracy to import cocaine in violation of 21 U.S.C. §963. He was thereafter sentenced to ten years imprisonment. His conviction was affirmed on appeal. 484 F.2d 311 (10th Cir. 1973). His application for writ of certiorari was denied by the United States Supreme Court. 415 U.S. 915 (1974).

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The details of the evidence presented in support of Smaldone's conviction on the conspiracy charge are fully set out in the opinion reported in 484 F.2d 311, supra, and will not be repeated here. The crux of the conspiracy charge and the evidence in support of Smaldone's conviction thereof is:

Commencing in April of 1972, Smaldone visited with one Larry Merkowitz, a pharmacist, in Aurora, Colorado, and thereafter Smaldone and Merkowitz put up approximately $9,750.00, each, under an agreement to purchase cocaine in Peru to be delivered and sold in the United States. The plan called for Craig Mundt, Ronald Greenspan and Ronald Nocenti to travel to Peru, purchase the cocaine and then smuggle it into the United States. Smaldone delivered his $9,750.00 to Nocenti on May 11, 1972. Mundt and Greenspan were arrested and detained by Peruvian authorities. Nocenti, however, returned from Peru to Denver on May 29, 1972. Merkowitz first met Nocenti, who delivered a briefcase to him. Thereupon, Merkowitz was arrested. Nocenti, a

Government informer, contacted Smaldone. Shortly thereafter, Smaldone met with Nocenti at the Sheraton Motor Inn in Denver, where Smaldone accepted a packet later determined to contain cocaine. Smaldone, under Government surveillance, was arrested there.

In his habeas corpus proceeding as authorized pursuant to 28 U.S.C. §2255, Smaldone moved to set aside his conviction and sentence on the following grounds, each of which were denied by the District Court and each of which are presented here as the issues on appeal, to-wit: (1) that the failure of the Government to produce a Report of interviews by the Bureau of Narcotics and Dangerous Drugs (BNDD) of a key Government witness (Nocenti), which Report contained evidence favorable to Smaldone and tended to discredit Nocenti, violated Smaldone's right of due process of law under Brady v. Maryland, 373 U.S. 83 (1963); (2) that the Report of interviews by the BNDD of Nocenti was producible under the Jencks Act, 18 U.S.C. §3500, and (3) that the Government's action in remaining silent when the

question of the existence of the BNDD Report of interviews with Nocenti was raised and when the Government was aware of the false nature of Nocenti's trial testimony requires a vacation of the conviction and sentence in that the action denied Smaldone a fair trial.

I.

Smaldone alleges that he was denied due process of law in violation of the mandates of Brady v. Maryland, supra, by reason of the failure of the Government to produce for his use at trial the Report, consisting of notes of an interview had between BNDD Agent Farabaugh and Nocenti March 1, and 6, 1972, on the grounds that the notes constitute an exculpatory statement.

The trial court found that the Farabaugh notes have no relation to Nocenti's testimony at Smaldone's trial, are not exculpatory in nature and do not impeach Nocenti's testimony given at Smaldone's trial. We agree.

Brady held that suppression by the Government of evidence favorable to the accused, upon request for disclosure,

violates the accused's due process of law where the evidence is material either to guilt or punishment, and this irrespective of the good faith of the Government. In United States v. Harris, 462 F.2d 1033 (10th Cir. 1972), we interpreted Brady to stand for the rule that the ". . . suppression, inadvertent or not, by the government of evidence favorable to the defense and affecting the credibility of a key prosecution witness may result in such inherent unfairness as to be violative of due process." Ibid. at 1034. In United States v. Miller, 499 F.2d 736 (10th Cir. 1974), we interpreted Moore v. Illinois, 408 U.S. 786 (1972) as holding that the Brady rule is applicable "only when the following factors exist: (a) suppression by the prosecution after a request by the defense; (b) the evidence's favorable character for the defense; and (c) the materiality of the evidence." Ibid. at 743. In United States v. Brumley, 466 F.2d 911 (10th Cir. 1972), cert. denied, 412 U.S. 929 (1973), we held that a defendant's due process rights are not

violated where the evidence which was not produced does not actually benefit the defendant's case.

Nocenti testified at trial that he had known Smaldone since 1968. Smaldone testified that his business and occupation was that of a gambler and that he had been a gambler some twelve years and had been convicted of gambling activities. The trial court observed that in light of Smaldone's criminal record, it was nothing unusual "in the fact that Mr. Smaldone was the subject of conversation at the Farabaugh interview, since Nocenti had known him since 1968." [R., Vol. IV, p. 67.] The trial court then outlined, in summary fashion, the Report of BNDD from the Farabaugh notes (this is the report in question) relating to conversations at the March 1 and 6 interviews when Nocenti was "debriefed" concerning his knowledge of drug trafficking and other illegal activities in the Denver area. Smaldone contends that withholding the Report was violative of his due process rights because: "If the jury believed Nocenti they could reason-

ably have concluded that [Smaldone] had joined the conspiracy. If Nocenti was lying and had actually given [Smaldone] the envelope under the pretense that it contained money to be given to Tomeo, as [Smaldone] testified, the jury would have no alternative but to find [Smaldone] was 'set up' by Nocenti for a crime which [Smaldone] did not commit. The suppressed BNDD Report showed Nocenti's discussion of the Smaldones at the outset of his relationship with the BNDD, and long before [Smaldone's] involvement in the alleged conspiracy . . . It further established Nocenti's indebtedness to Tomeo, and thereby materially supported Smaldone's testimony that when Nocenti handed him the envelope, Nocenti stated that it contained money for Tomeo." [Brief of Appellant, pp. 14, 15]

The same issue as above presented was previously urged by Smaldone on his prior direct appeal to this Court and rejected. This Court sustained the trial court's refusal to permit the defense to question Nocenti on cross-examination as to whether, prior to

May 31, 1972, he had borrowed money from Mike Tomeo. We rejected Smaldone's contention that the questioning was material to issues in the case.

We concur in the trial court's interpretation of the BNDD Report. It says -- contrary to Smaldone's claim here -- that Nocenti informed Farabaugh that he (Nocenti) ". . . borrowed $1,000.00 from Smaldone through Michael Tomeo, a known associate of Smaldone." The court did not err in ruling that the BNDD Report - Farabaugh notes have no relation to Nocenti's trial testimony. In further support of the correctness of the trial court's ruling, we observe that at trial both Smaldone and Tomeo testified that Nocenti was indebted to Tomeo and that the Government did not present evidence disputing the existence of such a loan. Smaldone's further trial testimony was that when Nocenti handed him the envelope, Nocenti stated that it contained the money he owed Tomeo on the loan, which he requested Smaldone to deliver to Tomeo. Certainly, under all of the circumstances of the record,

it cannot be contended that Smaldone was in anywise prejudiced by non-disclosure of the BNDD Report. The Report simply does not dispute Nocenti's trial testimony, nor does it in anywise corroborate Smaldone's and Tomeo's trial testimony going to the central defense theory of the case. The issue was clearly before the jury. It involved a credibility issue, pure and simple. It requires more than a stretch of the imagination -- in fact it requires guess, conjecture and speculation -- to fathom how the BNDD Report relating to Nocenti's alleged loan from Smaldone could in anywise corroborate the testimony given by Smaldone and Tomeo that Nocenti represented to Smaldone that the envelope containing the cocaine instead contained the moneys Nocenti owed to Tomeo which he (Nocenti) desired to have Smaldone deliver to Tomeo in repayment. In its best light, the loan reference in the BNDD Report is ambiguous and certainly the trial testimony would not have enlightened the jury with respect thereto.

II.

Smaldone contends that the trial court erred in denying his motion in that the BNDD Report above referred to was producible under and by virtue of the Jencks Act, 18 U.S.C. §3500.

The trial court cited the pertinent portions of 18 U.S.C. §3500(b), to-wit:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.
> [R., Vol. IV, p. 70]

The trial court ruled that nothing in the BNDD Report relating to the Nocenti-Farabaugh interviews of March 1 and 6, 1972, in anywise relates to the subject matter Nocenti testified to at trial and that, accordingly, the statements cannot be used for impeachment purposes, the only permissible use thereof, citing to Campbell v. United States, 365 U.S. 85, 92 (1961); Palermo v. United States, 360 U.S. 343, 352 (1959); and

Johnson v. United States, 269 F.2d 72, 74 (10th Cir. 1959). The court did not err in so finding. Nothing contained in the BNDD Report - Farabaugh notes could be used for impeachment purposes in that "Since the court foreclosed Nocenti from testifying about the Tomeo loan, the report could not be used to impeach on that matter . . . the remainder of the report contains information extraneous to any conspiracy to import cocaine from Peru or any attempt to 'frame' Smaldone. Consequently, the report did not 'relate' to Nocenti's testimony and its production was not required." [R., Vol. IV, p. 70.] We agree.

Smaldone contends that the trial court was "dead wrong" in the above finding and ruling, in that both the Government and the court ". . . obviously missed the point that Nocenti's talking about the Smaldones in early March 1972 supports the defense theory that Nocenti volunteered to implicate them in drug-related offenses which had not yet occurred. Certainly the Report would have helped in the cross-examination of Nocenti and

very likely would have led to a verdict of acquittal on the one count upon which [Smaldone] was convicted and with respect to which his theory of being 'framed' was applicable." [Brief of Appellant, p. 23.]

The trial court finding and ruling was not clearly erroneous. It finds substantial support in the record. On direct examination, Nocenti testified to the events relating to his trip to Peru, the period of time there involved and the events which transpired, including his return from Peru to his contact with Smaldone in Denver on May 30, 1972, when the envelope was delivered. Nocenti did not testify to any matters set forth in the BNDD Report relative to the March 1 and 6, 1972, interviews, all of which occurred before Smaldone joined the subject conspiracy. Furthermore, nothing in the Report relates -- in the critical subject matter sense -- to Nocenti's trial testimony. That testimony dealt with the Peru trip and his recorded telephone conversation prior to the May 30, 1972, meeting with Smaldone. The BNDD Report contains no subject

matter relating to Nocenti's direct testimony. The Report can fairly be characterized, as the Government contends, as Farabaugh's notes describing that related by Nocenti concerning Nocenti's "general background and to outline his knowledge of criminal activities." [Brief of Appellee, p. 13.]

We recognize that in determining whether "statements" may be used for impeachment purposes, it is not necessary that the statement be a flat contradiction of the testimony at trial, and that the omission from the reports of facts related at the trial, or a contrast in emphasis upon those facts, may be material to the defendant's ability to properly conduct cross-examination testing the credibility of the witness. Jencks v. United States, 353 U.S. 657 (1957). This, however, does not grant any comfort to Smaldone. The fact remains that -- in the plain words of the statute -- none of the "statements" in the report relate to the subject matter of Nocenti's testimony at trial.

The object of the Jencks Act was not only to protect Government files from unwarranted disclosure but also to allow defendants materials usable for the purposes of impeachment. Palermo v. United States, supra; United States v. Smaldone, supra. Under the Act, the burden is on the defendant to show that particular materials qualify as "Statements" and that they relate to the subject matter of the testimony of the witness. United States v. Pennett, 496 F.2d 293 (10th Cir. 1974); United States v. Smaldone, supra; Travis v. United States, 269 F.2d 928 (10th Cir. 1959); rev'd on other grounds, 364 U.S. 631 (1961); 1 A.L.R. Fed. 252 (1969); 5 A.L.R.3d 763, 779.

We recognize that there may be some conflict, interpretive-wise, in relation to two opinions from this court as to producibility under the Act. In Johnson v. United States, supra, we held that although demanded by the defendant for the purpose of impeaching the testimony of an FBI agent who had testified for the Government relative to

his interviews with the defendant, the agent's memorandum relating to the interviews was nevertheless not a "statement" as defined in the Act because the memorandum was completed after the interviews and was predicated entirely upon the agent's interpretations and impressions. This ruling, on like facts, was re-affirmed by our Court that same year in Travis v. United States, supra. In Mims v. United States, 332 F.2d 944 (10th Cir. 1964), cert. denied, 379 U.S. 888 (1964), we held that a memorandum report of an FBI agent relative to an interview that he had with the accused did constitute a "statement" within the meaning of the Act producible for cross-examination purposes upon demand of defense counsel where the FBI agent testified that the accused refused to make a "written statement." The FBI report consisted of notes relating to the interview and statements by the defendant. We need not resolve that which may be a conflict in our opinions, supra, in view of our full concurrence with the trial court's finding that the BNDD Report herein does not relate to anything Nocenti testified to in the

course of his direct examination and, accordingly, was not subject to production. Accord: United States v. Pennett, supra, United States v. Lepiscopo, 458 F.2d 977 (10th Cir. 1972). The Jencks Act prohibits the pretrial discovery of statements made by prospective government witnesses, and it narrowly defines "statements" as writings signed or adopted by the witness and accounts which are "a substantially verbatim recital" of a witness' oral statements. 18 U.S.C. §3500 (e). The issue of whether handwritten, informal, or rough interview notes taken by a government agent during an interview or criminal investigation constitutes producible Jencks Act "statements" has been much litigated. The issue is unresolved among the circuits. This Court, in United States v. Swindler, 476 F.2d 167 (10th Cir. 1973), cert. denied, 414 U.S. 837 (1973), held that the Government is not required under the Jencks Act to produce an agent's "informal" description of the testimony of several witnesses. Accord: United States v. Krilich, 470 F.2d 341 (7th Cir. 1972), cert. denied, 411 U.S. 938

(1973); United States v. Fioravanti, 412 F.2d 407 (3rd Cir. 1969), cert. denied, 396 U.S. 837 (1969). [Denying discoverability under Rule 16 of the Fed. Rules of Crim. Proc.] Contra: Under Jencks Act or Rule 16, supra; United States v. Johnson, 521 F.2d 1318 (9th Cir. 1975); United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975).

III.

Finally, Smaldone alleges that the Government's action in remaining silent when the question of the BNDD Report of interviews with Nocenti was raised and when the Government was aware of the false nature of Nocenti's trial testimony requires a vacation of the conviction and sentence because Smaldone was thereby denied a fair trial.

Nocenti, on cross-examination, testified that he conferred with Agent Spears of the BNDD sometime in late April of 1972, and that Smaldone's name was not brought up. Mr. Shellow, counsel for Smaldone, moved for "the production of any reports of the Bureau of Narcotics and Dangerous Drugs concerning the conference between Mr. Nocenti and Mr. Spears on or

about -- well, the first of March, 1972, and ask that the Court inspect this in camera to see whether or not it is producible, and whether or not I am entitled to have it." [R., Vol. 1, p. 316.] The court denied the request because the defense had adequate opportunity prior to trial to make the request and the defense did not present any evidence of the existence of such a report within the Jencks Act. [R., Vol. I, p. 316.] Smaldone urges, on appeal, that although at no time did Nocenti testify on direct examination that he had been interviewed by Agent Farabaugh of the BNDD, nevertheless, the question posed to Nocenti whether he had discussed the Smaldones with Agent Spears did, "within the context," include any conversation with Farabaugh. Smaldone insists that Nocenti's response that he did not discuss the Smaldones with Agent Spears constituted "outright perjury" because "it was grossly misleading for Nocenti to answer as to Spears, but fail to reveal that his conversation with Spears had been perfunctory and the

substantive interviews had actually been held with Farabaugh." [Brief of Appellant, p. 27.]

Smaldone insists that Government counsel and Agent Farabaugh (who was seated at the prosecution table) well knew that his counsel was unaware of any interviews Nocenti had with Agent Farabaugh, and, thus, failure to disclose the Farabaugh Report-notes deprived Smaldone of a "full opportunity to impeach a witness crucial to the Government's case." [Brief of Appellant, p. 29.]

There is no merit in the contention that the trial court erred in ruling that Nocenti had committed perjury or that the Government had knowingly permitted him to do so. He was cross-examined only with respect to his conversation with Agent Spears. There is no evidence indicating that Nocenti's testimony in that respect is false. Counsel for Smaldone persisted in inquiring of Nocenti concerning any subsequent conversations with Agent Spears. Even though counsel for Smaldone did not inquire of Nocenti relative to any conversation-interview he had with any agent of the BNDD except Agent Spears,

he argues now that the Government was obligated to volunteer the existence of the conversation-interview Nocenti had with Agent Farabaugh. We have heretofore held that the BNDD Report-Farabaugh notes were not subject to production under the Brady doctrine. If the Report-Farabaugh notes were in fact producible under the Jencks Act, such could only be compelled after Nocenti's direct examination and a timely motion by Smaldone requesting the court to order the Government to produce any "statement" of Nocenti in the possession of the United States which relates to the subject matter of the testimony of the witness [18 U.S.C. §3500(b)] for the exclusive purposes of impeachment. Jencks v. United States, supra. Smaldone has failed to bring his basic "need for disclosure" contention into play under the Brady doctrine or the Jencks Act. His argument is, for all practical purposes, simply that the Government prosecutor has an obligation to produce evidence which may or might in any manner aid in his defense. The contention is without merit. It fails to

recognize the basics of our adversary system. Congress did not intend the Jencks Act to afford criminal defendants carte blanche discovery means whereby government materials would be available to them in some ritualistic fashion regardless of their materiality and relevancy. United States v. Pennett, supra. The range of waiver is wide. Smaldone knew or should have known of his right to request any and all Jencks Act material he deemed proper and necessary to his defense. He failed to pursue a course plainly available to him. It matters not that his effort would have proved unprofitable for want of merit. A defendant cannot be permitted to elect to freely pursue one course at pre-trial and then, when that course has proved unprofitable, to allege deprivation of a fair trial on appeal. Johnson v. United States, 318 U.S. 189 (1943); United States v. Miller, 460 F.2d 582 (10th Cir. 1972); Puckett v. United States, 314 F.2d 298 (10th Cir. 1963).

WE AFFIRM.

No. 75-1959 - UNITED STATES v. SMALDONE. Breitenstein, Circuit Judge, concurring in result.

I concur in the result because I am in substantial accord with the district court's Opinion and Order which denied § 2255 relief.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 75-C-805

(Caption Omitted in Printing)

OPINION AND ORDER

(filed October 31, 1975)

CHILSON, Judge

The movant, Mr. Eugene L. Smaldone, Jr. (Smaldone) in an Indictment filed in this court in criminal action 72-CR-183, was charged in Count II with aiding and abetting importation of cocaine; in Count IV with possession of cocaine with intent to distribute, and in Count III, with a conspiracy to import cocaine in violation of Title 21 U.S.C. § 963.

After trial, the jury acquitted Mr. Smaldone of Counts II and IV and found him guilty of the conspiracy charge.

On January 5, 1973, Mr. Smaldone was sentenced to ten years imprisonment. Upon appeal, his conviction was affirmed. United States v. Smaldone, 484 F.2d 311 (10th Cir. 1973). Application for writ

of certiorari was denied by the United States Supreme Court. (415 U.S. 915).

The Tenth Circuit Court of Appeals in reviewing Mr. Smaldone's conviction summarized the facts established by the evidence as follows:

> "The evidence established that Larry A. Merkowitz was a pharmacist who operated a drugstore in Aurora, Colorado, and Nocenti was a paid government informant. The plan called for Mundt, Greenspan and Nocenti to go to Peru, buy the cocaine and deliver it to Merkowitz and Smaldone. All of this commenced in April 1972, when Smaldone first met Merkowitz who told him of the scheme. According to Merkowitz, Smaldone said that he was interested in investing in the deal, and subsequently Smaldone was told that cocaine would cost $6,500 per kilo. Thereafter, Smaldone met with Merkowitz at his pharmacy and delivered $8,750 stating that he would furnish an additional $1,000 so that he could buy one and one-half kilos. An equal amount was contributed by Merkowitz and the total was transferred to Nocenti who went to Peru and there by prearrangement met Mundt and Greenspan. Merkowitz had had some previous transactions in cocaine, and on or about April 13, 1972, he told Nocenti that Mundt and Greenspan

> wanted Nocenti to participate in smuggling cocaine from Ecuador. Later, Merkowitz told Nocenti that he was to be included. Two days after that Merkowitz met Smaldone at the apartment of one Judy Good. The discussion had to do with obtaining vitamins for Good's racing dogs. According to Merkowitz, he asked Smaldone on this occasion if he knew Mundt and Greenspan and was aware of their proposed smuggling venture. According to further testimony of Merkowitz, Smaldone stated that he would be interested in investing in this. On May 4, 1972, Merkowitz took Nocenti to Mundt's ranch east of Broomfield. Nocenti there met with Mundt and Greenspan. The very next night Merkowitz told Smaldone that Mundt, Greenspan and Nocenti had made arrangements for the trip to Peru and the cocaine was to cost $6,500 per kilo. According to Merkowitz, Smaldone said that he did not trust Mundt and he was curious as to the trustworthiness of Nocenti. He questioned Merkowitz about this. Smaldone also said that he was not sure that he wanted his share of the cocaine to be sold by Nocenti or to be sold by himself. Merkowitz in turn borrowed money from the Aurora

National Bank and delivered $9,750, the same amount that Smaldone had furnished to Nocenti on May 11, 1972. Nocenti returned from Peru on May 29, 1972.1/

"On May 29, 1972, Smaldone informed Merkowitz that Nocenti was back in town. Merkowitz tried to arrange a meeting between him, Nocenti and Smaldone. Merkowitz met Nocenti and following the delivery of a briefcase to him Merkowitz was arrested.

"Nocenti also contacted Smaldone. The latter went to the Sheraton Motor Inn and met with Nocenti, accepting a packet containing alleged cocaine and he was arrested on that occasion."

Mr. Smaldone now moves to vacate and set aside his conviction and sentence pursuant to 28 U.S.C. § 2255, alleging as grounds:

1/ "We gather that Mundt and Greenspan were arrested in Peru and that Nocenti brought $17,500 of the money back with him and also some samples of cocaine seized by the Peruvian police."

1. Nocenti, a Government witness, committed perjury at the trial;
2. The Government withheld exculpatory evidence; and
3. The Government failed to produce at the trial, a statement which it was required to produce under the Jencks Act, 18 U.S.C. §3500.

Briefs have been filed in support of and in opposition to the motion and oral argument has been heard.

The trial of Mr. Smaldone preceded the trial of the defendant, Craig Mundt. Nocenti testified as a Government witness in both trials.

PERJURY

The basis for Smaldone's charge of perjury is found at page 13 of his brief in support of the motion to vacate which states:

"- - - that Nocenti's testimony at movant's trial actually was perjured to the extent that he denied having mentioned the Smaldone name to the Bureau of Narcotics and Dangerous Drugs."

The trial transcript does not support the charge.

A reading of the trial transcript of the Smaldone trial beginning at page 305 and continuing to page 317 reveals that in the latter part of February or early March 1972, Nocenti talked to an F.B.I. Agent, Mr. Lyons, about a job as an informer. Several days later, he talked to Mr. Spears, the Regional Director of Bureau of Narcotics and Dangerous Drugs, (B.N.D.D.). Nocenti was asked by Mr. Smaldone's counsel on cross-examination, if during his conversation with F.B.I. Agent, Lyons, "Did Mr. Smaldone's name come up?" Answer: "Yes." Transcript, page 312.

Nocenti was also asked by Mr. Smaldone's counsel:

> "Q. On the occasion of your conference with Mr. Spears, was Mr. Smaldone's name mentioned?"

Nocenti answered, "No, sir."

(See pages 314 to 316 trial transcript.)

Nocenti was not questioned about his conversations with other B.N.D.D. agents.

At the Mundt trial, counsel for Mundt inquired about Nocenti's conference with Spears and then for the first time Nocenti was quesioned about his conversation with a Mr. Farabaugh, an Agent of the B.N.D.D. Nocenti freely admitted in his testimony at the Mundt trial that he told Farabaugh that he knew Smaldone and that Smaldone was discussed in his conversation with Farabaugh. Nocenti did not testify that he discussed Smaldone with Spears, and there is no evidence that he did. We find nothing in the record which supports the perjury charge.

FAILURE TO PRODUCE AN EXCULPATORY STATEMENT

Smaldone asserts that the Government was under an obligation to produce for his use at trial, Farabaugh's notes of his interview with Nocenti on March 1 and March 6, 1972, as the notes constitute an exculpatory statement.

Nocenti's interviews with Farabaugh were the result of Nocenti's desire to become employed by the B.N.D.D.

as an informer. Thus, the interview conducted by Farabaugh was directed toward Nocenti's knowledge of illegal activities in the Denver area.

Mr. Smaldone testified on direct examination by his own counsel as follows:

"Q. What is your business and occupation?

"A. I am a gambler.

"Q. How long have you been a gambler?

"A. About twelve years.

"Q. Have you ever been convicted of any activities relating to your profession?

"A. Yes, sir, I have.

"Q. And are your convictions of the law related to gambling?

"A. Yes, they are."

(Pages 675 and 676 trial transcript.)

In view of his criminal record, we see nothing unusual in the fact that Mr. Smaldone was the subject of conversation at the Farabaugh interview, since Nocenti had known him since 1968.

In summary fashion, we set forth the references to Mr. Smaldone contained in

Mr. Farabaugh's notes. The notes read in pertinent parts:

"On 3/1 and 3/6/72, S.N. - 12 - 0017 (Nocenti) was debriefed relative to his knowledge of drug trafficking and other illegal activities in the Denver area; - - -.

"(Nocenti) stated that he first met Eugene Smaldone through a person known to him as Arky - - - he borrowed $1,000 from Smaldone through Michael Tomeo, a known associate of Smaldone - - - (Nocenti) stated that he has done favors for Smaldone and Tomeo and has known them actively since the latter part of 1968. These favors were mostly business or legal in nature. He stated that he put the sound system in Smaldone's new house and has transported Smaldone and Tomeo around town and once to Pueblo, Colorado, on various errands. However, he felt he was being used by these individuals and ceased to actively associate with them. - - -

"After Merkowitz found out about (Nocenti's) association with Smaldone, Merkowitz volunteered the information that Steve Goldberg had brought a quantity of cocaine out of Ecuador about three weeks ago. Merkowitz also told (Nocenti)

about George (LNU), a Negro male who is allegedly a front man for Eugene Smaldone. George (LNU) allegedly deals in heroin, which he obtains in Mazatlan, Mexico.

"(Nocenti) also stated that the Valley View Hospital and Medical Center, an osteopathic hospital located at 8451 Pearl, Thornton, Colorado, connected with the Smaldones. Doctors associated with the hospital had allegedly front organized crime money on various stock transactions and other business investments. The Smaldones allegedly obtain Ritalin from the hospital for use on racing dogs."

The Farabaugh notes have no relation to Nocenti's testimony at Mr. Smaldone's trial, nor are they exculpatory in nature nor do they impeach Nocenti's testimony given at the Smaldone trial.

The Court has not overlooked the contention that the notes support the testimony of Smaldone and Tomeo, who testified that Nocenti was indebted to Tomeo.

The Tomeo loan is related to the conspiracy charge in that Mr. Smaldone, testifying in his own behalf, stated

that at the meeting with Nocenti when Nocenti delivered to him the envelope containing the cocaine, Nocenti told him the envelope contained money which he requested Smaldone to deliver to Tomeo for payment of the loan which Tomeo had made to Nocenti.

Tomeo also testified that he had made such a loan to Nocenti. There is no evidence denying that Tomeo had made a loan to Nocenti and the Government did not dispute it. The Court foreclosed Nocenti from testifying about it.

The Court's refusal to permit the questioning of Nocenti on this point was assigned as error by Mr. Smaldone upon his appeal and in his brief filed May 11, 1973, with the Tenth Circuit Court of Appeals at pages 42 and 43, Smaldone alleged error as follows:

> "NOCENTI was asked on cross-examination whether prior to May 31, 1972, he had borrowed money from MIKE TOMEO. (T. 327) The government's objection to the question on grounds of materiality was sustained. (Ibid.) An offer of proof was made that the witness would have testified that he owed

money to TOMEO on that date. (T. 335) TOMEO testified that on May 28, 1972 he discussed with NOCENTI the money NOCENTI owed him. (T. 671-672)

> "The cross-examination of NOCENTI on this issue was crucial. Since defendant acknowledged that he had a telephone conversation with NOCENTI and as a result of that conversation met with him at the Olive and Grape lounge, the only issue was whether the delivery of the package was in furtherance of a narcotics conspiracy, as testified to by NOCENTI, or whether defendant believed he was accepting money owed to TOMEO, as defendant testified. (T. 700-701) Defendant asserts that the court should have permitted this inquiry as it would have elicited "competent evidence in support of [his] theory." United States v. McCowan, 471 F.2d 361, 365 (10th Cir. 1972)."

Since the Court of Appeals affirmed the conviction, we must assume that this Court's ruling did not constitute prejudicial error and is not cause for this Court to vacate the conviction and sentence.

JENCKS ACT

It is also asserted that the Farabaugh notes constituted a statement which the Government should have produced under the Jencks Act, 18 U.S.C. §3500.

The Jencks Act, 18 U.S.C. §3500, provides in pertinent part:

> "(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified."

The Farabaugh notes relate to his interview of Nocenti on March 1 and March 6, 1972. The purpose of the interview was Nocenti's desire to obtain employment by the B.N.D.D. as an informer and Farabaugh's interest in Nocenti's knowledge of drug trafficking and other illegal activities in the Denver area. The conspiracy alleged in the indictment was not yet in existence nor had Nocenti been employed by the B.N.D.D. at that point in time.

The Statute requires the Government to produce any statement "which relates to the subject matter as to which the witness has testified." The statements are to be used for impeachment purposes only. Campbell v. United States, 365 U.S. 85, 92 (1961); Palermo v. United States, 360 U.S. 343, 352 (1959); Johnson v. United States, 269 F.2d 72, 74 (10th Cir. 1959). Here, nothing is contained in the Farabaugh notes which could be used for impeachment purposes. Since the Court foreclosed Nocenti from testifying about the Tomeo loan, the report could not be used to impeach on that matter. As noted above, the remainder of the report contains information extraneous to any conspiracy to import cocaine from Peru or any attempt to "frame" Smaldone. Consequently, the report did not "relate" to Nocenti's testimony and its production was not required.

The motion to vacate Mr. Smaldone's conviction and sentence should be denied.

IT IS THEREFORE ORDERED that the motion to vacate the conviction and

sentence of Eugene L. Smaldone, Jr., be and the same is hereby denied.

Entered this 31st day of October, 1975.

BY THE COURT:

/s/

Senior United States
District Judge

REPORT OF INVESTIGATION

General File
Larry MERKOWITZ, et al.

By: Donald J. Farabaugh, S/A
At: Denver, Colorado
Date: March 7, 1972

Other Officers: S/A Larry L. Orton
S/A Charles F. Kiefer

Report Re:
Debriefing of SN-12-0017 Relative to
Drug and Organized Crime Information.

DETAILS:

1. On 3/1 and 3/6/72, SN-12-0017 was debriefed relative to his knowledge of drug trafficking and other illegal activities in the Denver area. SN-12-0017 stated that he has been in the Denver area since 1966. He has previously been in the construction business and microfilm business (hospital records), and sound system business. He has declared bankruptcy in his business ventures and is currently employed as a salesman for the Horizon Land Corporation in Denver.

2. SN-12-0017 stated that he first met Eugene SMALDONE through a person known

to him as ARKY, a bartender at the Red Lion in Arvada, Colorado. He borrowed $1,000 from SMALDONE through Michael TOMEO, a known associate of SMALDONE, paying interest at the rate of 5% per month. He stated he paid $800 in interest to TOMEO, but after a gambling raid on TOMEO's premises turned up the data relative to the loan, TOMEO told him that he would no longer have to continue paying interest on the loan. Since that time, over a year ago, he has not made any payments on the interest or principal.

3. SN-12-0017 stated that he has done favors for SMALDONE and TOMEO and has known them actively since the latter part of 1968. These favors were mostly business or legal in nature. He stated he put the sound system in SMALDONE's new house and has transported SMALDONE and TOMEO around town and once to Pueblo, Colorado on various errands. However, he felt he was being used by these individuals and ceased to actively associate with them.

4. SN-12-0017 stated that Steve GOLDBERG was the contractor who built SMALDONE's house. He met Larry MERKOWITZ, owner-operator of the CHAMBERS HEIGHTS PHARMACY on Chambers Road in Aurora. After MERKOWITZ found out about SN-12-0017's association with SMALDONE, MERKOWITZ volunteered the information that Steve GOLDBERG had brought a quantity of cocaine out of Ecuador about three weeks ago. MERKOWITZ also told SN-12-0017 about GEORGE (LNU), a negro male who is allegedly a front man for Eugene SMALDONE. GEORGE (LNU) allegedly deals in heroin which he obtains in Mazatlan, Mexico. SN-12-0017 pointed out a house at 2701 St. Paul Street, Denver, which he believes to be the residence of GEORGE (LNU).

5. MERKOWITZ is also dealing in large quantities of methaqualone. MERKOWITZ told SN-12-0017 that there is a large illicit market for this drug and he is shipping it in 10,000 - 20,000 dose quantities to various locations in the country, often shipping these drugs to non-existent nursing homes. These drugs are then picked up by associates in

these cities who represent themselves to be from the non-existent nursing home.

6. SN-12-0017 has described the methaqualone as orange A&S tablets and SMP blue capsules. A check of the PDR disclosed that Arnar-Stone and Smith, Miller and Patch manufacture products containing methaqualone. SN-12-0017 stated that MERKOWITZ wants him to act as a courier, dealing these drugs to various locations in the U.S. MERKOWITZ also stated that a CRAIG, who has either a drug manufacturing or wholesale company in Wichita, Kansas, is a source of supply for methaqualone and also probably amphetamines. CRAIG is also alleged to be building a plant in Tulsa, Oklahoma at the present time. MERKOWITZ told SN-12-0017 he would like him to assist in delivering a large quantity of methaqualone to a J. THOMPSON, 110 East Cherry Lane, State College, Pennsylvania.

7. SN-12-0017 further related that on one occasion he was contacted by MERKOWITZ who told him he had 40 pounds of hash in cubes for sale. SN-12-0017 went to TOMEO

and TOMEO expressed interest. However, MERKOWITZ could not produce the hash. SN-12-0017 also stated that the VALLEY VIEW HOSPITAL AND MEDICAL CENTER, an osteopathic hospital located at 8451 Pearl, Thornton, Colorado, connected with the SMALDONES. Doctors associated with the hospital allegedly front organized crime money on various stock transactions and other business investments.

8. The SMALDONES allegedly obtain Ritalin from the hospital for use on racing dogs. SN-12-0017 also related that a black male named TROY owns a liquor store in the Five Point area of Denver and buys bags of an unidentified drug from MERKOWITZ at his pharmacy.

/s/ Donald J. Farabaugh
Group Supervisor, RIU

/s/ James M. Burke
Deputy Regional Director
Date: 3/15/72